BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion and modified opinion in the Circuit Court of Appeals for the Seventh Circuit are set forth in the transcript of record filed in this cause at pages 928 and 966 thereof.

The revised and substituted report of the Master in Chancery, to whom the cause was referred by the District Court, appears in the transcript of record at pages 856 to 882 thereof.

The decree entered in the District Court, adopting, approving and confirming the revised and substituted report of the Master, appears in the transcript of record at page 900 thereof.

JURISDICTIONAL GROUNDS.

The jurisdiction of this court is invoked by virtue of the provisions of Section 240(a) of the Judicial Code, as Amended, by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, entitled, "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Court of Appeals and the Supreme Court, and for other purposes."

The United States Circuit Court of Appeals for the

Seventh Circuit on February 28, 1941, reversed the order or decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 946)

A petition for rehearing was filed on March 14, 1941, within the time allowed under the provisions of Rule 22 of the United States Circuit Court of Appeals for the Seventh Circuit. (R. 948)

On the 7th day of April, 1941, the Circuit Court of Appeals for the Seventh District entered an order denying said petition for rehearing and by said order modified the opinion theretofore filed by the court. (R. 966) The certified transcript of record, the petition for the issuance of a writ of certiorari with supporting brief annexed thereto are filed herein with the Clerk of this court within three months after denial of the said petition for rehearing in the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE.

The essential facts in the case at bar are set forth in the preceding Petition for a Writ of Certiorari under Point I thereof, and in the interest of brevity are hereby readopted and made a part of this brief.

SPECIFICATION OF ASSIGNED ERRORS.

The Circuit Court of Appeals for the Seventh Circuit erred:

(1) In holding that the respondent, John G. Getz, Jr., was a bona fide purchaser for value of the certificates of indebtedness, which were acquired by him after default had been made by the City of Harvey in the payment of both principal and interest.

(2) In holding that the contract between the City of Harvey and A. C. Allyn & Company failed because one of the conditions in said contract was never fulfilled, whereas the record shows that the contract was impossible of performance by reason of the acts and conduct of A. C. Allyn & Company alone.

SUMMARY OF ARGUMENT.

1. The respondent, Getz, is not a bona fide purchaser for value of the $243,000.00 par value certificates of indebtedness of the City of Harvey, the subject matter in this suit.

2. There was a binding refunding contract between the City of Harvey and A. C. Allyn & Company.

ARGUMENT.

I.

THE RESPONDENT, JOHN G. GETZ, JR., IS NOT A BONA FIDE PURCHASER FOR VALUE OF THE $243,000.00 PAR VALUE CERTIFICATES OF INDEBTEDNESS OF THE CITY OF HARVEY, THE SUBJECT MATTER IN THIS SUIT.

In answer to interrogatories, respondent, John G. Getz, Jr., stated that he acquired $243,000.00 per value certificates of indebtedness of the City of Harvey from C. S. Mott on November 20, 1937, and that he paid the sum of $243,000.00 for said certificates. (R. 40 and 44)

In answer to other interrogatories, he stated he had knowledge that said certificates had been in default since August 1, 1933. These answers were sworn to before a notary public on the 7th day of June, 1939. (R. 40 and 44)

On the 3rd day of August, 1939, John G. Getz, Jr., in answer to questions asked upon cross-examination, testified that he acquired the $243,000.00 certificates of indebtedness of the City of Harvey during March, 1939; that he acquired them from C. S. Mott for whom he worked; that he did not pay cash for them, but that he gave his note in the amount of $243,000.00 in payment of said certificates; that his note in that amount was not a good note; that his earnings did not warrant "his issuing a note of that magnitude"; that he made no investigation of the ordinances of the City of Harvey because the bonds bear an opinion; that he did not see the opinion until the bonds

were delivered; that he did not recall whose opinion accompanied the bonds; that the $243,000.00 certificates of indebtedness of the City of Harvey are held by C. S. Mott as collateral to his note. (R. 349 and 354)

The Circuit Court of Appeals for the Seventh Circuit in overruling the findings of the Master in respect of the status of the respondent Getz and in reversing the judgment in the District Court, says in its opinion:

> "The title of plaintiff as a bona fide purchaser for value of non-negotiable certificates without notice of defense, like that of an assignee of a chose in action, is in no wise affected by any latent equity arising, not out of the consideration upon which the certificate was issued but out of unknown dealings between the issuer and an intermediate holder in plaintiff's chain of title." (R. 933)

The court decided that the certificates are non-negotiable instruments, but urges that they are subject only to the defenses which might have been made against the payee to whom they were originally issued. This is not the law in our opinion.

We believe the law of Illinois is definite on this point. It is:

> "The holder of non-negotiable instruments holds it subject not only to all defenses originally existing against the payee, but as to all defenses arising before notice of transfer."
>
> 17 Amer. & Eng. Ency. of Law, 232.
>
> *Bank* v. *Hines*, 177 Ill. 417.
>
> *Barker* v. *Barth*, 192 *id.* 460.

The court in its opinion further says (R. 932):

> "We are first confronted with the question of whether plaintiff, in the situation he finds himself, is bound by any alleged latent equity in the favor of the city as against O'Brien and Allyn & Company.

> The master found, and the court agreed, that plaintiff stood in the shoes of Allyn & Co. But the evidence discloses that plaintiff is a purchaser for value and had no knowledge of any dealings between the City and O'Brien or Allyn & Company."

The evidence shows that the respondent, Getz, at the time he acquired said certificates, knew that they had been in default for almost five years. (R. 44)

In view of the evidence, the court's conclusion should have been that respondent had the duty to inquire of the maker the reason for the default. Respondent would then have been informed of petitioner's claims against A. C. Allyn & Company, for petitioner, City of Harvey, was the maker. Respondent's failure to make such inquiry does not excuse him and he is charged with knowledge of the City's defenses. The cases cited by the court (R. 933) in its opinion are not in conflict with this proposition, but on the contrary sustain it. The court quotes with approval the following language from the case of *Silverman* v. *Bullock, et al.*, 98 Ill. 11:

> "Persons dealing in such securities can, *without difficulty, inquire of the makers if any defenses exist against them,* but more than that it is not practicable to do. Of Course, it would not be possible to discover, even by the utmost diligence, all persons that might have equitable rights in the subject matter of the assignment, and the adoption of a rule that would let in latent equities to prevail against the assignee would be to ensnare dealers in such securities." (Italics added.)

A familiar definition of bona fide purchaser, as given in Ballentine's Law Dictionary, 1930 Edition, is "One who buys for a valuable consideration with an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law."

23 R. C. L. 241.

Mr. Getz fails to qualify under this definition for Mr. Getz filed his complaint in this case June 9, 1938, within three months of the time he says he acquired said certificates, and in this suit seeks to recover not only the principal amount of said certificates, but in addition thereto, more than $220,000.00 in past due interest coupons (R. 623), where the evidence shows that the respondent purchased said certificates with a note which he admits was not good. (R. 218)

II.

THERE WAS A BINDING REFUNDING CONTRACT BETWEEN THE CITY OF HARVEY AND A. C. ALLYN & COMPANY.

The Circuit Court of Appeals for the Seventh Circuit in its opinion (R. 934) says:

> "The first proposal, that of April 20, 1936, was not one which bound O'Brien to do anything other than 'to lend his best efforts toward refinancing the obligations outstanding.' The second (Sept. 8th, 1936) was expressly subject to and 'dependent' upon his ability to purchase and deliver the outstanding securities in exchange for the refunding certificates. The evidence is undisputed that he was never able to comply; that he found it impossible to procure all of the outstanding certificates and so notified the city. Neither proposal required him to deliver to the city anything less than the entire outstanding lot of certificates, and he was bound to do that only if he were able to procure all of them. When this condition, upon which existence of a binding contract depended, remained unsatisfied, all obligations of the city to him and of him to the city were at an end."

The court overlooks the evidence in the record, which shows that the O'Brien contract was dependent upon his ability to acquire sufficient certificates "to declare his

plan workable," and was not dependent upon his ability to acquire all of the outstanding certificates. (Defendant's Exhibit 6, Rec. 716.)

The court misapprehends the evidence and fails to note that the contract of September 8, 1936, between the City of Harvey and Roy D. O'Brien provided that the time limit of ninety days might be extended with the consent of the Mayor and Chairman of Finance Committee of the City of Harvey. (Rec. 715, 716)

The court overlooks the records which shows that the parties by their conduct extended the time for performance, in this, that A. C. Allyn & Company on January 28, 1937 (Def. Ex. 41, Rec. 756), addressed a direction to the City of Harvey to publish the refunding ordinance previously adopted by the City of Harvey on January 25, 1937 (Rec. 712), at the request of O'Brien. (Rec. 755, 756) All of these proceedings were had after the expiration of the ninety-day term specified in the contract of September 8th.

The court overlooks the evidence in the record (Rec. 725) that thirteen days earlier on January 15, 1937, A. C. Allyn & Company had put it beyond its power to comply with the refunding contract, by having sold $220,000.00 par value of securities held by it to William H. Donner of Philadelphia without previous notice to the City.

The court overlooks the evidence that there had been full compliance with the conditions of the contract of September 8, 1936, on the part of the City of Harvey. See testimony of Frank W. Bruggemann, Mayor of Harvey. (Rec. 438)

The court overlooks the evidence in the record that $429,000.00 or $430,000.00 par value outstanding certificates of indebtedness were in the possession or under the control of A. C. Allyn & Company (Rec. 444) and that, under the provisions of the contract of September 8, 1936,

it was proposed to refund but $452,000.00 certificates of indebtedness. (Rec. 715)

The court overlooks the evidence which shows that on January 28, 1937, when A. C. Allyn & Company directed the City of Harvey to publish the refunding ordinance, which had been adopted on January 25, 1937, it had sold and disposed of all of the certificates which it had acquired in pursuance of the refunding contract with the City of Harvey and had placed an obstacle in the way of the happening of the event upon which the contract of September 8, 1936, was based.

The court misapprehends the law with respect to the facts above set forth. The applicable principle of local law is set forth at page 225 in the case of *Jordan* v. *Busch*, 285 Ill. App. There the court says:

> "It seems clear that where a contract is made which is performable at the time of the occurrence of a future event, the law imputes to the promisor an agreement that he will put no obstacle in the way of the happening of that event and that he will hold himself in readiness to co-operate where his co-operation is a necessary element. If, in violation of this implied covenant on his part, he does something which prevents the happening of the event, the contract becomes absolute and must be performed as though the event had occurred. *Marvin* v. *Rogers*, 53 Tex. Civ. App. 423, 115 S. W. 863."

The petitioners respectfully submit that a Writ of Certiorari should be granted in order that this court may review the judgment of the Circuit Court of Appeals in the exercise of its supervisory powers.

Respectfully submitted,

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